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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL WEISS et al., Plaintiffs and Appellants, v. CITRUS HEIGHTS, LLC, et al., Defendants and Respondents.	D058614 (Super. Ct. No. GIC859147)

APPEAL from judgments of the Superior Court of San Diego County, Luis Vargas, Judge. Affirmed.

OVERVIEW

Appellants Paul Weiss and Deborah Weiss, husband and wife (the Weisses), are the former homeowners of real property located at 1435 Logan Court, Escondido, California (subject property). The subject property is located within a 17-unit planned residential development called Citrus Heights Development (subject development) created by respondents Citrus Heights, LLC, and Trans West Housing, Inc. (together,

developers). Respondent Citrus Heights Association (HOA or Association) is a nonprofit mutual benefit corporation that manages the subject development. The subject property at all times relevant in this case was subject to a Declaration of Restrictions (CC&Rs) that was properly recorded in May 2002.

The Weisses in their operative complaint alleged they purchased the subject property in 2002. They further alleged the construction of the subject property was delayed and there were myriad construction defects involving the subject property. The Weisses' first and second causes of action were against the developers for breach of contract and negligence, respectively.

The Weisses' third through eighth causes of action were against their former neighbors, defendants David Gilbert and Danielle Gilbert (the Gilberts). The Weisses and the Gilberts shared a common property line. The Gilberts are not parties in this appeal.

The Weisses' ninth cause of action for declaratory relief was against the developers, the HOA, the Gilberts and respondent the City of Escondido (City). The Weisses alleged that a controversy had arisen regarding the respective rights and obligations of the parties to "maintain the forced air sewer pipes which are part of the property that was dedicated to the City of Escondido or the public at large" by the developers. The Weisses further alleged that the City contended that the "sole obligation to maintain and repair the dedicated sewer pipes (or alternatively described as pipes

under the public streets and sidewalks) is the . . . HOA or the joint and several obligations of the 17 members of that association."

In July 2009, a notice of default was recorded against the subject property. The subject property was sold at public auction in June 2010 and a trustee's deed upon sale was properly recorded on June 25, 2010.[1]

In response, the Weisses in June 2010 filed a separate action against their former lender, JP Morgan Chase, San Diego County Superior Court Case No. 37-2010-00056768-CU-OR-NC (Chase action). In the Chase action, the Weisses alleged they "lost their interest in the [subject] property includ[ing] improvements to the [subject]

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1 We reject the Weisses' contention that the trial court erred when it took judicial notice of the trustee's deed to establish the subject property had in fact been sold. Initially, we note that the Weisses failed to object to the HOA's request for judicial notice and failed to lodge an evidentiary objection to the certified copy of the recorded trustee's deed, which we deem fatal to their contention. (See *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726 [noting the failure to object to evidence admitted by the trial court forfeits on appeal the argument such evidence was inadmissible because among other things the "[l]ack of such objection deprives the proponent of the evidence an opportunity to establish a better record or some alternative basis for admission."].) Despite forfeiting the issue, we nonetheless conclude the trial court properly exercised its discretion when it took judicial notice of the certified copy of the trustee's deed, among other documents. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1079.) Finally, even if we assume the trial court erred when it took judicial notice of the trustee's deed, we conclude that alleged error was harmless because the Weisses admitted in a related action that they lost their interest in the subject property to foreclosure. (See Cal. Const., art. VI, § 13; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432 [noting that where evidence is wrongfully excluded, that error is not reversible unless " ' "it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]" [Citations.]' ")

property . . . ." The Weisses in the Chase action alleged six causes of action against their former lender, including a claim for wrongful foreclosure.

The Weisses appeal three separate judgments in the instant case.

As to the HOA, the trial court granted without leave to amend the HOA's motion for judgment on the pleadings, ruling the Weisses lacked standing to assert against the HOA their declaratory relief claim (ninth cause of action) because the conveyance of the subject property via the foreclosure sale divested the Weisses of all membership rights in the HOA pursuant to Civil Code section 1358, subdivision (c). The trial court subsequently granted the HOA's motion for an award of attorney fees and entered judgment in favor of the HOA in December 2010.

In connection with the City, the trial court summarily adjudicated the Weisses' declaratory relief claim against the City, ruling that the City met its burden to show the HOA and *not* the City was responsible for the maintenance of the sewer system in the subject development, which the HOA did not dispute. In so doing, the trial court declined to rule on the City's separate motion for judgment on the pleadings, which the City filed while its motion for summary adjudication was pending and after the subject property was sold at the foreclosure sale. Judgment was entered in favor of the City in September 2010.

Finally, as to the developers, the trial court granted their separate motion for judgment on the pleadings, ruling that because the Weisses no longer owned the subject property and because the Weisses "assigned their rights to all claims, causes of action,

judgments, settlements, and funds received and receivable related to alleged damage to the [subject] [p]roperty, they are no longer the real parties in interest" to assert claims against the developers. The trial court entered judgment in favor of the developers in September 2010.

As we explain, we conclude that judgment was properly entered with respect to respondents the HOA, the City and the developers.[2]

DISCUSSION

I

The HOA

A. *Declaratory Relief*

1. *Additional Background*

As noted *ante*, the Weisses' only claim against the HOA is for declaratory relief regarding an alleged dispute over whether the City, the HOA or some other party or

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[2] The Weisses failed to appear for oral argument before this court despite the fact notice of oral argument was sent *directly* to the Weisses' last known address on *two* separate occasions, after it was discovered that the Weisses' counsel (who was also their trial counsel) had passed away *after* briefing was completed. The Weisses made no attempts to communicate with this court regarding their situation, or otherwise moved to substitute new counsel or themselves into the action. Although we reach the merits of their appeal, we note it would not have been inappropriate under the circumstances presented here to treat the Weisses' failure to appear at oral argument as an abandonment of their appeal. (See *Jordan v. County of Los Angeles* (1968) 267 Cal.App.2d 794, 798 [recognizing the rule that a party forfeits the right to challenge action by trial court when party fails to file briefs *or* appear for oral argument].)

parties were obligated to "maintain, repair or improve" the sewer system at the subject development.

In granting without leave to amend the motion of the HOA for judgment on the pleadings, the trial court ruled in part as follows:

"As a preliminary matter, the Motion was timely filed. The court can permit a party to file a Motion for Judgment on the Pleadings later than 30 days after the action is initially set for trial. (Code Civ. Pro[c]., § 438(e).) Here, good cause exists to allow this Motion to proceed since the events giving rise to the Motion only recently occurred.

"Defendant Association is named in the Ninth Cause of Action for Declaratory Relief only. This cause of action alleges there is a controversy regarding the parties' obligations to maintain the sewer system in the [subject] [d]evelopment. [The Weisses] contend the HOA has no obligation to maintain the sewer lines, and that it has no power to assess [the Weisses], as members of the HOA, for the costs to maintain the sewer system. [Citation.]

"The [subject] [p]roperty at issue here has been sold at a non-judicial foreclosure sale. [Citation.] This transfer of the [subject] [p]roperty divests [the Weisses] of membership in the [HOA]. A voluntary or involuntary transfer of property also includes transfer of the owner's membership interest in the Association. (Civ. Code § 1358(c)[.])

"Thus, there is no longer an 'actual controversy' between [the Weisses] and the Association as to the Declaratory Relief Cause of Action. Since [the Weisses] are no

longer members of the Association, they will not be liable for any future assessments levied by the Association for the maintenance or repair of the sewer system.

"In addition, there is no longer an 'actual controversy' between [the Weisses] and the Association as to this cause of action based on the court's ruling granting Defendant City of Escondido's Motion for Summary Judgment. The court has determined Defendant City of Escondido has no responsibility for the maintenance of the . . . sewer system. There is nothing more to adjudicate in the Ninth Cause of Action."

2. *Analysis*

The Weisses generally contend the trial court erred in granting without leave to amend the HOA's judgment on the pleadings because there was no evidence presented that the Weisses were then not still in possession of the subject property and because even if the HOA was in fact the owner of the sewer lines, the Weisses "also face individual responsibility as a co-owner of the sewer line[s]."

The CC&Rs provide at Article III, Section 3.1: "Every owner of a Lot which is subject to assessment by the Association shall be a Member of the Association. Membership is appurtenant to and may *not be separated from ownership of a Lot.*" (Italics added.)

Similarly, Civil Code section 1358, subdivision (c), provides:

"In a planned development, any conveyance, judicial sale, or other voluntary or involuntary transfer of the separate interest includes the undivided interest in the common areas, if any exist. Any conveyance, judicial sale, or other voluntary or *involuntary*

transfer of the owner's entire estate also includes the owner's membership interest in the association." (Italics added.)

We note the Weisses do not discuss Civil Code section 1358, subdivision (c) in their briefing, despite the fact the trial court specifically relied on this statute in concluding there was no longer an "actual controversy" between the parties because the Weisses were divested of membership in the HOA when the subject property was sold at public auction. In addition, the Weisses also do not address in their briefing the application to them of Article III, Section 3.1.

In any event, we independently conclude that once the Weisses ceased being members of the HOA by contract (Article III, Section 3.1) and by operation of law (Civ. Code, § 1358, subd. (c)) after the subject property was sold at public auction and ownership of it was transferred, the Weisses were no longer the real parties in interest pursuant to Code of Civil Procedure section 367[3] and they lacked standing to assert there was an "actual controversy" regarding whether the City and *not* the HOA was obligated to "maintain, repair or improve" the sewer system at the subject development.

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[3] Code of Civil Procedure section 367 provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."

That the Weisses allegedly were (or are) still in possession of the subject property after the foreclosure sale does not change our conclusion.[4] Indeed, as made abundantly clear by Article III, Section 3.1 and by Civil Code section 1358, subdivision (c), membership in the HOA goes hand in hand with ownership, and thus once the subject property was sold at auction, the Weisses no longer were owners, and thus were no longer members of the HOA to raise an alleged "actual controversy" involving the sewer system at the subject development. (See e.g., *Countrywide Home Loans, Inc. v. Tutungi* (1998) 66 Cal.App.4th 727, 732-733 [holding buyer of condominium unit purchased at foreclosure sale was entitled to insurance proceeds distributed by homeowners association after the sale because under Civil Code section 1358, subdivision (b) and under the applicable covenants, conditions and restrictions of the development, once buyer became record owner it replaced the former owners of that unit as members of the homeowners association]; see also *Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 Cal.App.4th 863, 865 [holding homeowners association owed no duty to inform a

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4 The HOA argues that, because the Weisses did not raise in the trial court the issue of whether their alleged continued possession of the subject property after the foreclosure sale entitled them to pursue declaratory relief against the HOA, the issue is forfeited on appeal. (See generally *Mepco Services, Inc. v. Saddleback Valley Unified School Dist.* (2010) 189 Cal.App.4th 1027, 1049, fn. 29 [failure to raise argument in trial court generally forfeits that argument on appeal].) However, in reviewing the Weisses' opposition to the motion for judgment on the pleadings, we note the Weisses argued that "as long as [they] are in possession of their home, [they] . . . have a right to call upon the [C]ity to correct problems in the sewer mains that underlay the [C]ity streets" and that because the City "denies any such obligation," there is a "fundamental dispute" between the parties. We thus do not consider the issue forfeited.

prospective purchaser of construction defects or the existence of a civil action against the developer to repair the defects].)

Moreover, because the Weisses were no longer members of the HOA after the sale of the subject property in 2010, they no longer were subject to any *future* assessments by the HOA, which are limited to members of the HOA who, as we have seen, must also be owners.[5] (See Article IV, Section 4.1 ["each *Owner* of a Lot [in the subject development] is deemed to covenant to pay to the Association . . . regular assessments . . . which shall include an adequate reserve fund for the periodic maintenance, repair and replacement of the Common Area and Common Maintenance Area [as defined in the CC&Rs]" and "special assessments," which assessments shall be "a charge on the land and shall be a continuing lien upon the Lot against which each such assessment is made." (Italics added.)])

In addition, because, as discussed *post*, we conclude the trial court properly entered judgment in favor of the City when it found that the HOA and not the City was responsible to maintain the sewer system at the subject development, for this separate and

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[5] There is nothing in the record suggesting the Weisses were liable for any *past* assessments imposed by the HOA (whether or not limited to the sewer system). In any event, we note the gravamen of their declaratory relief action against the HOA related to which party or parties were obligated to "maintain, repair or improve" the sewer system at the subject development, as opposed to any concerns or issues regarding whether the Weisses would be liable for maintaining the sewer system or for any alleged environmental injury.

independent reason there was no "actual controversy" for purposes of the Weisses' ninth cause of action for declaratory relief.

B. *Award of Attorney Fees*

1. *Additional Background*

After the trial court granted the HOA's motion for judgment on the pleadings, the HOA sought an award of attorney fees in the amount of $66,414 and costs in the amount of $1,732.62.[6]

The trial court found the HOA was the prevailing party in the action within the meaning of Code of Civil Procedure section 1032. As such, the trial court further found that the HOA was entitled to an award of reasonable fees pursuant to Code of Civil Procedure section 1354, subdivision (c) and Section 10.7 of the CC&Rs. The trial court found no allocation of fees was warranted based on the evidence submitted by the HOA that it incurred the attorney fees in connection with the defense of the Weisses' operative complaint. The trial court thus awarded the HOA $60,610 in attorney fees.

The Weisses contend the trial court's award of attorney fees was unreasonable because the trial court should have required the HOA to allocate those fees it incurred in defending the declaratory relief claim from those it allegedly incurred in prosecuting its cross-complaint against the developers and the City. According to the Weisses, it was unreasonable for the trial court to find that the HOA incurred more than $60,000 "to

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[6] The Weisses did not challenge in the trial court or in this court the HOA's entitlement to, or award of, costs.

defend against the non-monetary declaratory relief sought by [the Weisses regarding who] had the responsibility to maintain sewers that were under the [C]ity streets," while at the same time finding the HOA allegedly "spent nothing to prosecute the claims for damages that it sought from the very same defendants that [the Weisses] had sued."

2. *Analysis*

We note that the Weisses do not challenge the findings of the trial court that the HOA was the prevailing party when the trial court granted its motion for judgment on the pleadings and was entitled to an award of reasonable attorney fees under the CC&Rs.[7]

In deciding whether to allocate attorney fees between contractual and noncontractual issues and in deciding on an amount of fees to award, the trial court was required to exercise its sound discretion and we will not reverse its award unless there was an abuse of that discretion. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 [amount of award]; *Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111 [allocation].)

Here, there is evidence in the record supporting the finding of the trial court that all of the attorney fees incurred by the HOA related to its defense of the declaratory relief claim. This evidence included the declaration of the HOA's counsel, as well as counsel's billing records setting forth a description of the work performed and the cost of such

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[7] The Weisses argued in the trial court that their interests were aligned with the HOA and thus the HOA allegedly was not the prevailing party. However, the Weisses wisely have abandoned that argument on appeal.

work, all of which were included in the HOA's motion for an award of attorney fees and costs.

Because we conclude the trial court's finding is supported by credible evidence (see *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894), we further conclude the trial court did not abuse its discretion when it awarded the HOA $60,610 in attorney fees. (See *PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095 [observing that a "trial court has broad authority to determine the amount of a reasonable fee" and as such, and because the " 'trial judge is the best judge of the value of professional services rendered in his [or her] court . . .[,] his [or her] decision will not be disturbed unless the appellate court [determines]' it abused its discretion."].)

C. *Request to Dismiss the Appeal and for Sanctions*

The HOA filed against the Weisses and their attorney of record an opposed motion to dismiss the appeal and a request for $5,500 in sanctions pursuant to California Rules of Court, rule 8.891(e)(1)(A).[8]

"One of the reasons that the power to dismiss an appeal must be used with extreme rarity is that determination of whether an appeal is frivolous entails at least a peek at the merits—if not, as is usually the case, a thorough review of the record—and, having taken that look, the appellate court is in a position to affirm whatever was appealed rather than dismiss the appeal." (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1319; see also *People v. Wende* (1979) 25 Cal.3d 436, 443 ["Once the record has been reviewed

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8 Rule 8.891(e) of the California Rules of Court provides: "(e) Sanctions [¶] (1) On motion of a party or its own motion, the appellate division may impose sanctions, including the award or denial of costs, on a party or an attorney for: [¶] (A) *Taking a frivolous appeal* or appealing solely to cause delay . . . . [¶] (2) A party's motion under (1) must include a declaration supporting the amount of any monetary sanction sought and must be served and filed before any order dismissing the appeal but no later than 10 days after the appellant's reply brief is due. If a party files a motion for sanctions with a motion to dismiss the appeal and the motion to dismiss is not granted, the party may file a new motion for sanctions within 10 days after the appellant's reply brief is due. [¶] (3) The court must give notice in writing if it is considering imposing sanctions. Within 10 days after the court sends such notice, a party or attorney may serve and file an opposition, but failure to do so will not be deemed consent. An opposition may not be filed unless the court sends such notice. [¶] (4) Unless otherwise ordered, oral argument on the issue of sanctions must be combined with oral argument on the merits of the appeal." (Italics added.)

thoroughly, little appears to be gained by dismissing the appeal rather than deciding it on its merits."].)

Here, the question of whether the appeal is frivolous required us to review the record and consider the arguments presented in the briefs by both sides. Although we ultimately affirmed the judgment in favor of the HOA, we arrived at that conclusion based upon such review and consideration. We therefore conclude the appeal is not "frivolous at a glance." (See *People ex rel. Lockyer v. Brar*, *supra*, 115 Cal.App.4th at p. 1320; see also *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

Moreover, even if the appeal is arguably frivolous as to the order granting the HOA's motion for judgment on the pleadings, it is not frivolous as to the order awarding the HOA attorney fees. Although an appeal can be *partially* dismissed, the policy in favor of promptly dismissing frivolous appeals in order to avoid delay is less compelling when the parties will still need to await the resolution of the surviving portion of the appeal. As such, for this separate and independent reason we deny the HOA's motion to dismiss *and* request for monetary sanctions.

II

The City

1. *Additional Background*

The Weisses' only claim against the City was for declaratory relief (ninth cause of action). As noted *ante*, this claim involved an alleged controversy over which party or parties were obligated to "maintain, repair or improve" the sewer system at the subject

development. The City filed its motion for summary adjudication in May 2010, *before* the subject property was sold at public auction. In that motion, the City proffered substantial evidence showing the sewer system was neither dedicated to the City nor did the City accept a dedication of that system as a public sewer system. The City thus claimed it owed no legal duty or obligation to maintain it.

In mid-July 2010, the HOA filed its statement of non-opposition to the City's summary adjudication motion, agreeing that the sewer system was in fact privately owned. Specifically, the HOA therein stated that it "agrees that the Developer Defendants never dedicated the private . . . sewer system to the City and further agrees the City never accepted the system, nor did it accept responsibility for maintenance of the system."

While the motion for summary adjudication was pending, the subject property was sold at public auction. In response, the City in mid-July 2010 filed its own motion for judgment on the pleadings, claiming—along with the HOA and the developers—that the Weisses no longer had standing to seek declaratory relief regarding the party or parties responsible to "maintain, repair or improve" the sewer system at the subject development because the Weisses were no longer owners of the subject property and thus were no longer members of the HOA.

The trial court granted the Weisses' motion for summary adjudication in late July 2010. As a result, in August 2010 the trial court refused to rule on the City's motion for

judgment on the pleadings, finding that motion "moot" because it already had granted the City's summary adjudication motion.

In granting summary adjudication, the trial court ruled in part as follows:

"Defendant City . . . has met its burden to show it is not responsible for the maintenance of the . . . sewer system.

"The City submits evidence it has not expressly dedicated or accepted the . . . sewer system. Government Code [section] 66439(c) provided at the time of the dedication in this case that 'an offer of dedication of real property for street or public utility easement purposes shall be deemed not to include any public utility facilities located on or under the real property unless, and only to the extent that, an intent to dedicate the facilities is expressly declared in the statement.'

"The City submits evidence the Development is subject to a Declaration of Restrictions ('CC&Rs'), which provide that the properties within the Development are subject to the ordinances, regulations and permits issued by the City. (City's UMF [undisputed material facts] Nos. 24, 26[.]) The Conditions of Approval contained in City Resolutions 5277 and 2000-221R provide the . . . sewer system shall be maintained by the homeowners association. (City's UMF Nos. 16-17[.]) The Tract 820 Street Improvement Plans drafted by the Developer also reference the homeowners association's responsibility for the maintenance of the . . . system. (City's UMF Nos. 19-20; City's NOL [notice of lodgment] Ex. 6[.])

"The City submits further evidence there is no specific dedication of the . . . sewer system in the Final Map. The Final Subdivision Map No. 14284 expressly includes an offer to dedicate two streets within the Development. It also grants the City a public utility easement on Lot 9, which is unrelated to the . . . sewer system, and an easement for tree planning and maintenance. (City's UMF Nos. 22, 54; City's NOL Ex. 5[.]) The Final Map contains no express offer to dedicate the . . . sewer system to the City. (City's UMF No. 53; City's NOL Ex. 5[.]) Since the offer of dedication here contains no statement of intent to dedicate the . . . sewer system to the City, under Government Code [section] 66439(c)[] the dedication is deemed not to include the . . . sewer system.

"The City also submits evidence it has not impliedly accepted the . . . sewer system. The City submits evidence there has never been a public use or public maintenance of this system. (City's UMF No. 55[.]) Only the Development is serviced by this system. ([John] Burcham Decl., ¶ 7[.]) The City does not service or maintain the system. (City's UMF No. 56; Burcham Decl., ¶ 9[.]) The City does not have the equipment or personnel to service the system. (City's UMF No. 58[.])

"[The Weisses] have failed to show the existence of a triable issue of material fact. [The Weisses] submit no evidence the City expressly dedicated the . . . sewer system. [The Weisses] contend the City accepted the dedication of the sewer system by accepting the Final Map. However, as discussed above, the Final Map contains no statement of intent to dedicate the . . . sewer system to the City.

"[The Weisses] also contend the City impliedly accepted the . . . [sewer] system because it was involved in its design and construction. However, *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, relied upon by [the Weisses], is inapplicable to the facts of the instant case. *Marin* is an inverse condemnation case, and does not deal with the issue of street dedications. Moreover, [the Weisses] submit no evidence the City designed or constructed the . . . sewer system.

"[The Weisses] further contend that had the City intended the homeowners to maintain the sewer system, the City could have required such a provision be included in the CC&Rs, or it could have refused to approve the CC&Rs. However, as discussed above, the CC&Rs provide the properties are subject to the ordinances, regulations and permits issued by the City, including Resolution No. 2000-111R and Conditions of Approval TR 820. (City's UMF Nos. 24, 26; City's NOL Ex. 7 at p. 8[.]) The regulations provide the . . . sewer system shall be maintained by the homeowners association. (City's UMF Nos. 16-17[.]) Moreover, the City is not the author of or a party to the CC&Rs. (See City's NOL Ex. 7[.])

"[The Weisses] have failed to create a triable issue of material fact regarding the City's responsibility for the maintenance of the . . . sewer system. Therefore, summary adjudication of [the Weisses'] Ninth Cause of Action for Declaratory Relief is granted in favor of the City.

"The City's request for judicial notice is granted.

"[The Weisses'] request for judicial notice is granted.

"[The Weisses'] evidentiary objections contained in their Separate Statement are overruled. (Cal. Rules of Court, rule 3.1354(b)[.])"

2. *Analysis*

As a court of review, we review judgments, not reasoning, and we will affirm a trial court's order and judgment thereon if it is correct on any ground. (See *Donovan v. RRL Corp*. (2001) 26 Cal.4th 261, 278, fn. 5.)

As the City recognizes in its briefing in this court, we need not consider whether the trial court properly granted the City's summary adjudication motion in order to affirm judgment in favor of the City, in light of the City's motion for judgment on the pleadings that addressed the same issues raised by the HOA and by the developers in their separate motions, discussed *ante* and *post*, respectively. Although the trial court declined to rule on the City's motion for judgment on the pleadings, we conclude as a matter of law that once the subject property was sold at public auction and ownership of it was transferred, the Weisses lacked standing to assert there was an "actual controversy" regarding whether the City and not the HOA was obligated to "maintain, repair or improve" the sewer system at the subject development. (See e.g., Civ. Code, § 1358, subd. (c); Code

Civ. Proc., § 367.) Thus, as a matter of law judgment was properly entered in favor of the City on the Weisses' declaratory relief cause of action.[9]

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9 The result would be the same even if we reached the merits of the summary adjudication motion, inasmuch as the undisputed evidence shows that the sewer system was not designed or constructed by the City, that the system was not dedicated to the City and the City did not accept a dedication of that system, and that the HOA agrees that the City bears no responsibility for the system's maintenance.

III

The Developers

1. *Additional Background*

As noted, the Weisses sued developers for breach of contract, negligence and declaratory relief based on alleged construction defects to the subject property. After the subject property was sold at public auction in June 2010, developers filed their own motion for judgment on the pleadings, arguing that the Weisses lost standing to pursue any claims against them because the Weisses no longer owned the subject property as a result of the foreclosure sale and because they defaulted under the terms of the deed of trust, which in turn triggered the contractual assignment clause contained therein.

The trial court granted without leave to amend the developers' motion for judgment on the pleadings, ruling in part as follows: "[The Weisses] are no longer the real parties in interest with standing to assert the First and Second Causes of Action [for breach of contract and negligence, respectively]. A cause of action for damage to real property accrues when the defendant's act causes immediate and permanent injury to the property. Thus, if a property owner suffers harm because of inadequate design or construction work, a cause of action accrues to that owner. The owner may transfer that cause of action to another, but without some manifestation of intent, the cause of action is not transferred to a subsequent owner. (*Krusi v. S.J. Amoroso Construction Co.* (2000) 81 Cal.App.4th 995, 1005[.])

"Here, [the Weisses] executed a Deed of Trust, recorded on May 2, 2005, which assigns [the Weisses'] rights and causes of action to the Lender. (Developer Defendants' NOL, Ex. 4[.]) Specifically, the Deed of Trust provides: [¶] 'Borrower hereby absolutely and irrevocably assigns to Lender all of Borrower's right, title and interest in and to (a) any and all claims, present and future, known or unknown, absolute or contingent, (b) any and all causes of action, (c) any and all judgment or settlements . . . and (e) any and all funds received or receivable in connection with any damage to such property . . . .' (*Id.* at pp. 6-7[.])

"The Property at issue has been sold at a non-judicial foreclosure sale. (Developer Defendants' NOL, Ex. 3[.]) The Trustee's Deed Upon Sale, recorded on June 25, 2010, provides that the Trustee 'does hereby grant and convey . . . to Bank of American, NA . . . all of its right, title, and interest in and to' the Property. (*Id.* at p. 1[.]) In addition, in [the Chase action] recently filed by [the Weisses], [the Weisses] allege they have suffered 'a loss of their home' and that they have 'lost their interest in the property.' (Developer Defendants' NOL, Ex. 5 [.])

"Since [the Weisses] no longer own the Property, and have assigned their rights to all claims, causes of action, judgments, settlements, and funds received and receivable related to alleged damage to the Property, they are no longer the real parties in interest with standing to bring the First and Second Causes of Action.

"[The Weisses] also lack standing to bring the Ninth Cause of Action for Declaratory Relief. Since [the Weisses] no longer own the Property, there is no 'actual

controversy' regarding [the Weisses'] responsibility to pay for any future assessments levied by the Association for the maintenance or repair of the sewer system.

"In addition, there is also no longer an 'actual controversy' between [the Weisses] and the Developer Defendants as to this cause of action based on the court's ruling granting Defendant City of Escondido's Motion for Summary [Adjudication]. The court has determined Defendant City of Escondido has no responsibility for the maintenance of the . . . sewer system. There is nothing more to adjudicate in the Ninth Cause of Action.

"[The Weisses] contend the court should deny this Motion because they filed [the Chase action] to set aside the non-judicial foreclosure. However, as discussed above, [the Weisses] currently have no ownership interest in the Property, and are not the real parties in interest with respect to their claims against the Developer Defendants. Therefore, [the Weisses] currently do not have standing to maintain the causes of action alleged against Developer Defendants.

"Developer Defendants' Request for Judicial Notice is granted."

2. *Analysis*

Turning first to the ninth cause of action for declaratory relief, for the reasons provided *ante* in connection with the HOA and the City we independently conclude that after the subject property was sold at public auction and ownership of it was transferred, the Weisses lacked standing to assert there was an "actual controversy" regarding whether the City was obligated to "maintain, repair or improve" the sewer system at the subject development. (See e.g., Civ. Code, § 1358, subd. (c); Code Civ. Proc., § 367.)

The trial court therefore properly granted the developers' motion for judgment on the pleadings with respect to the declaratory relief cause of action.

Turning next to the breach of contract and negligence causes of action, for the same reason we also conclude that any injury to the subject property claimed by the Weisses was barred after the subject property was sold at public auction. At that point, the Weisses no longer were the real parties in interest entitled to recover for such injury because they no longer owned, or had the right to possess, the subject real property. Instead, the purchaser of the subject property at foreclosure became the real party in interest with respect to any injury to the subject property. (See Code Civ. Proc., § 367; see also *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 906 [noting that every action must be prosecuted in the name of the real party in interest and further noting that "to state a cause of action for injury to real property, plaintiff's ownership, lawful possession, or right to possession, of the property must be alleged."].)

In any event, we also agree with the developers that the assignment clause in the deed of trust[10] the Weisses executed in 2005 with their lender (e.g., JP Morgan, later to become JP Morgan Chase) barred the Weisses' recovery against the developers. (See *Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633 [when there is no conflicting

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10 The assignment clause in the deed of trust applied to "any and all claims, present and future, known or unknown, absolute or contingent," "causes of action," "judgments and settlements" and funds "in connection with any damage to such property."

extrinsic evidence concerning the meaning of contract language, we exercise our independent judgment to interpret the contract under the well-established rules of contract interpretation].) As such, for this separate and independent reason we conclude the trial court properly granted without leave to amend the developers' motion for judgment on the pleadings on the first and second causes of action.

DISPOSITION

The judgments in favor of respondents (e.g., HOA, the City and the developers) are affirmed. Respondents to recover their costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

AARON, J.